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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1947.

**No. 205**

**GLOBE LIQUOR COMPANY, INC., A Corporation,**  
Petitioner,

VS.

**FRANK SAN ROMAN and DOROTHEA SAN ROMAN,**  
Doing Business Under the Firm Name and  
Style of International Industries,  
Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION  
TO PETITION FOR CERTIORARI.**

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Petitioner,

vs.

**FRANK SAN ROMAN and DOROTHEA SAN ROMAN,**  
Doing Business Under the Firm Name and Style of  
International Industries,  
Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION  
TO PETITION FOR CERTIORARI.**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

I.

**INTRODUCTION.**

The chief points of the respondents in opposition to the petitioner's petition for certiorari are summarized as follows:

a. Neither Rule 50 of the Federal Rules of Civil Procedure nor the case of *Cone v. West Virginia Pulp and Paper Co.* apply to the instant suit, where the trial

court directed a verdict and entered judgment on the motion of the petitioner without submitting the case to the jury. *The facts were undisputed and fully developed in behalf of the petitioner*, so that only questions of law were involved. Therefore, it was unnecessary for the respondents to file a motion for judgment notwithstanding the verdict to enable the Circuit Court of Appeals to reverse the judgment in behalf of the petitioner entered in the trial court and to enter judgment for the respondents on the legal questions involved.

b. The disclaimer of any warranty as to the goods in question by the respondents and the absence of any express or implied warranty as to the goods were raised by the respondents in the trial court.

c. The grounds of the respondents' motion for a directed verdict in the trial court and the basis of the reversal and entry of judgment for the respondents by the Circuit Court of Appeals were presented in the trial court.

d. Even if the portions of the depositions of Todes, the salesman for the respondents, described in the petitioner's petition for certiorari, had been admitted in evidence, the petitioner would not be entitled to any recovery because of the undisputed disclaimer of any warranty as to the goods by the respondents, and the absence of any express or implied warranty as to the goods.

e. The respondents filed within ten days a motion in the trial court to set aside the verdict and judgment and for a new trial. This motion had the same legal effect as a motion by the respondents for judgment notwithstanding the verdict would have had if filed in the trial court, assuming, but not conceding, that Federal Rule

50 (b) applied to the case at bar. The respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new trial it exercised its discretion in that regard.

f. The entry of judgment in favor of the respondents by the Circuit Court of Appeals was fair and just on the undisputed facts and applicable legal principles. The shipper of the goods in Mexico, the principal and actual seller, promptly offered to recondition the goods at his own expense under United States Government supervision. This offer was rejected by the petitioner. Had this offer been accepted, the original sale would have been fully performed and no one would have been injured.

g. There are no conflicting decisions by any Circuit Courts of Appeals as to the non-applicability of Rule 50 of the Federal Rules of Civil Procedure when the trial court grants a motion for a directed verdict and enters judgment without submitting the case to the jury for its independent determination of the facts. It is clear beyond all doubt that the purposes, history and plain and unambiguous language of Rule 50 of the Federal Rules of Civil Procedure establish that this rule was not intended to nor does it apply to a case where the trial court directs a verdict and enters judgment without submitting the case to the jury.

h. Assuming that in the trial court, motions for judgment notwithstanding the verdict of the jury had been made in the cases of *Cone v. West Virginia Pulp*

*and Paper Co., Berry v. United States, Conway v. O'Brien and Halliday v. United States, the Circuit Court of Appeals would not have had the power to reverse the judgment of the trial court and enter judgment for the appellant in each of these cases, as they involved controversies of fact that had to be decided by a jury.*

## II

### **The Basic Issue and Inconsistent Position of Petitioner As to Trial By Jury.**

The chief question presented by the petition for certiorari relates to Rule 50 of the Federal Rules of Civil Procedure which involves motions for directed verdicts in jury trials, and the automatic reservation of the decision on the motion by the trial court with power to determine the legal questions raised by the motion after the jury has returned a verdict after exercising its own judgment on the facts.

In the instant suit, the petitioner's basic procedural point is that the Circuit Court of Appeals did not have the power after it reversed the judgment of the trial court, to enter a judgment for the respondents because of their failure to file a motion for judgment in their favor in the trial court. The respondents' motion for a directed verdict at the conclusion of all the evidence had been promptly denied by the trial court and the trial court, instead, directed a verdict for the petitioner and immediately entered judgment for the petitioner on the directed verdict. Then within ten days thereafter, the respondents filed a detailed motion to set aside the directed verdict and judgment and for a new trial, and this motion was promptly denied by the trial court. (Rec. 204-6, 209.)

The petitioner relies heavily on this court's decision in *Cone v. West Virginia Pulp & Paper Company*, 67.

S. Ct. 752, in support of its contention that the Circuit Court of Appeals in the instant suit did not have the power to reverse the judgment entered by the trial court and to enter judgment for the respondents on appeal, because the respondents failed to file a motion for judgment in the trial court notwithstanding the verdict under Rule 50 (b) of the Federal Rules of Civil Procedure.

The *Cone* case and all the other cases relied upon by the petitioner and cited by it in its petition were all jury cases, i. e., cases where in each instance the trial court permitted the case to be submitted to the jury to exercise its independent judgment as to the facts. In every case cited by the petitioner decided by this court the original jury verdict rendered in the trial court was either sustained, or the case was remanded to the trial court for a new trial before a jury. In other words, *all these cases involved controverted questions of fact* that should have been or would have to be passed on by a jury for its independent judgment as to the facts. -In each of these cases there existed a constitutional barrier for the Circuit Court of Appeals to enter a final judgment because these cases involved conflicting factual questions that had to be decided by a jury.

In the instant suit, as amplified later, it will be seen that only questions of law were involved, that all of the facts were undisputed and the petitioner's proof was fully developed, and that there was no question of any missing element of proof or missing witnesses in behalf of the petitioner. Moreover, there was no question nor is there any question in the instant case that any evidence was improperly admitted in the trial court in behalf of the petitioner, that requires supplanting or correction.

An analysis of the purposes, history and wording of Rule 50 of the Federal Rules of Civil Procedure discussed later in this brief demonstrates without doubt that Rule 50 does not apply when the trial court grants a motion for a directed verdict when made and does not submit the case to the jury for its independent determination of the facts. It will also be seen that this rule only applies to cases where the court reserves its motion for a directed verdict and permits the case to go to the jury for its independent determination of the facts, and, after the jury returns its verdict, the trial court then has the power to rule on the previously reserved motion for a directed verdict, notwithstanding the verdict of the jury.

The respondents, who were the defendants in the trial court, asked for a trial by jury. The petitioner, the plaintiff in the trial court, did *not* ask for a trial by jury. After the evidence was completed, it appeared to both parties that there was no disputed question of fact and that only questions of law were involved. At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict, and the grounds in support of this motion were argued at length orally in the trial court (Rec. 116-120). This motion was denied by the trial court.

At the conclusion of all the evidence in the case, the petitioner made an oral motion for a directed verdict *without assigning any grounds* in support of its motion (Rec. 173), and the respondents filed a written motion for a directed verdict. (Rec. 202). The trial court denied the respondents' motion for a directed verdict and promptly allowed the petitioner's unsupported oral motion for a directed verdict (Rec. 173-176).

It comes with ill grace for the petitioner in this court to confuse the precise question involved by its fallacious argument that the Circuit Court of Appeal's order entering judgment in favor of the respondents after reversal of the judgment in the trial court, violated petitioner's right to a trial by jury when the petitioner did all that it could in the trial court to prevent the case from being passed on by the jury. Moreover, the petitioner was successful in the trial court in preventing the jury from passing on the case.

This afterthought by the petitioner in now demanding a new trial by jury has no merit as the instant case involves only questions of law on undisputed facts that were fully developed in behalf of the petitioner in the trial court.

Both before and after the adoption of the Federal Rules of Civil Procedure, Circuit Courts of Appeals have always had the inherent, historical and statutory power to enter final judgment, without remanding the case to the trial court for a new trial, where only questions of law are involved, and the facts were undisputed and presented fully in the trial court, and there was a directed verdict in the trial court without the case being submitted to the jury for its independent determination as to the facts. Under these circumstances, the case becomes, in effect, a trial by the court without a jury.

The grounds of respondents' motion for directed verdict in their behalf were fully and adequately stated in the trial court and were fully argued there. We amplify this statement later in this brief. Moreover, the failure of the petitioner to prove the existence of *either an express or an implied warranty* as to the goods in question, and the existence of a disclaimer of any warranty by respondents were points that were fully raised in the trial court and argued there.

There are no conflicting decisions in the various Circuit Courts of Appeals as to the basic questions involved in the case at bar relating to Rule 50 of the Federal Rules of Civil Procedure. The rule is clear, literate and unambiguous, and free from doubt and it patently applies only to cases where the trial court, notwithstanding its reservation for a directed verdict as to legal questions involved, permits the case to go to the jury for its independent determination of the facts, and then the trial court later passes on the legal questions reserved by the previous motion for a directed verdict. The Circuit Court of Appeals in the instant case aptly stated this procedural point in the following language in its position on the petition for rehearing (Rec. 259, 260):

“Rule 50 (b) in our opinion applies only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict. Where the court directs a verdict for the plaintiff as in the instant case, the matter is not submitted to the jury for it to exercise its independent judgment on the facts. The court has exercised its judgment on a matter of law.”

### III.

**The History, Purposes and Wording of Rule 50 of the Federal Rules of Civil Procedure Establish Beyond All Doubt That This Rule Does Not Apply to Directed Verdicts Where the Court Grants a Motion for a Directed Verdict Without Submitting the Case to the Jury for Its Independent Determination As to the Facts.**

The very title of Rule 50(b), “Reservation of Decision on Motion”, establishes that this rule applies only when the trial court reserves its decision on a motion for a directed verdict. Before the Federal Rules of Civil Procedure were adopted there is no question but that Circuit Courts of Appeals then had the power to reverse judgments of trial courts and enter final judgment for appel-

lants in cases involving questions of law only, where the trial court had entered a judgment for the appellee on its motion for directed verdict, without submitting the case to the jury for its independent judgment on the facts, and where the appellee's case had been fully developed in the trial. Obviously, Rule 50 of the Federal Rules of Civil Procedure was not intended to curtail or cut down this inherent, historical and statutory power of Circuit Courts of Appeals.

One of the chief purposes of Rule 50 (b) was to automatically reserve the legal questions involved by a motion for a directed verdict so that the motion can be passed on after a verdict is returned by the jury that uses its independent judgment to pass on the facts. In *Berry v. U. S.*, 312 U. S. 450, cited in *Cone v. West Virginia Pulp & Paper Company*, this court said, "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right, but not the mandatory duty, to enter a judgment contrary to the jury's verdict without granting a new trial." In this *Berry* case the trial court permitted the case to go to the jury for its independent determination of the facts.

Prior to the adoption of the Federal Rules of Civil Procedure this court decided *Baltimore & Carolina, Inc. v. Redman*, 295 U. S. 654. In that case the defendant's motion for a directed verdict was denied by the trial court and the case went to the jury. The Circuit Court of Appeals reversed the judgment of the trial court because, as a matter of law, the evidence was insufficient to sustain the verdict, and this court held that the Circuit Court of Appeals had the power to embody a direction for a judgment of dismissal on the merits and not for a new trial, and that the judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. In that case the de-

*defendant did not file a motion for a judgment in the trial court.* That case contains a full discussion on the historic as well as the common law well established practice of reserving rulings on questions of law arising during jury trials, and of reserving rulings on motions for directed verdicts with the power to make ultimate disposition of the case.

When the Federal Rules of Civil Procedure were being drafted and discussed, this decision of *Baltimore & Carolina, Inc. v. Redman* was constantly referred to in the discussion involving the proposed rules, particularly in the discussion by Mr. William D. Mitchell, former Solicitor General of the United States. We must assume, therefore, that Rule 50 (b) was drafted in the light of the holding of the United States Supreme Court in *Baltimore & Carolina, Inc. v. Redman*. (Proceedings in Washington Institute on Federal Rules, 1938 p. 126 (last paragraph) p. 127 (first paragraph); New York Symposium on Federal Rules (1938), pp. 282, 283, 330; Cleveland Institute on Federal Rules (1938) p. 314.)

At page 16 of the petition for certiorari the petitioner cites *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389. In that case the motions of both parties for a directed verdict were denied and the jury returned a verdict for the defendant. The plaintiff in that case filed a motion for a new trial but did not file a motion for judgment, notwithstanding the verdict. That case was decided before the adoption of the Federal Rules of Civil Procedure. The Circuit Court of Appeals reversed the judgment of the trial court and entered judgment for the plaintiff for the agreed amount of the fire loss in question. This court reversed the Circuit Court of Appeals and held that that court did not have the power to enter judgment for the plaintiff, and the case was remanded to the trial court for a new trial. The petitioner should have set forth

this court's reasons for that procedure and they are, first, that both parties abandoned their motions for a directed verdict by both requesting the trial court for special instructions to the jury; secondly, neither party requested the trial court to reserve its rulings on the motions for a directed verdict and to pass on the motions after the jury would return its verdict, and, lastly, under the Conformity Act, there was a Pennsylvania State statute applicable at the time which required the losing party in the trial court to file a motion for judgment notwithstanding the verdict to empower a reviewing court to enter judgment upon reversal on appeal in favor of the losing party in the trial court.

At page 16 of its petition for certiorari the petitioner correctly states one of the purposes of Rule 50 when it says;

"One of the purposes of Rule 50 (b) was to avoid the constitutional questions involved in the *Slocum* case (*Slocum v. New York Life Ins. Co.*, 228 U. S. 364) by making automatic the reservation approved in the *Redman* case for the later determination of the legal questions raised by the motion for a directed verdict."

At page 4 of its petition for certiorari, under footnote 2, the petitioner cites *Halliday v. United States*, 315 U. S. 94; *Berry v. United States*, 312 U. S. 450, and *Conway v. O'Brien*, 312 U. S. 492. In each of these cases, as well as the *Cone* case, unlike the case at bar where the trial court directed a verdict for the petitioner, the trial court automatically reserved for later decision the legal questions involved by a motion for directed verdict and submitted the case to the jury under Rule 50(b) for its independent voluntary consideration and determination of the facts. In each of these cases the Circuit Court of Appeals reversed the judgment of the trial court and en-

tered judgment for the losing party in the trial court. In none of these cases did the losing party file a motion for judgment notwithstanding the verdict in the trial court.

In each of the *Halliday*, *Berry* and *Conway* cases this court reinstated the verdict of the jury in the trial court and the judgment thereon, and in the *Cone* case this court remanded it to the trial court for a new trial before a jury. In the case at bar questions of law only are involved, the facts are all undisputed, the petitioner's proof has been fully developed and introduced, and there is no element existing in the case of missing witnesses or a failure of the plaintiff to establish a missing element of proof.

In the *Halliday*, *Berry* and *Conway* cases, even if the losing parties had filed in the trial court motions for judgment notwithstanding the verdict of the jury, nevertheless the Circuit Court of Appeals would still have been without power to reverse the judgments of the trial court and to enter judgment for the losing party in the trial court, because in each of these cases there were controverted questions of fact involved that had been or would have to be passed on by a jury because of the constitutional right to a trial by jury by the winning party in the trial court. The decision of this court in those cases had no relation to Rule 50B.

An analysis of the very language of Rule 50(b) is so illuminating that it becomes self evident that this rule applies only to situations where the trial court, after a motion for directed verdict, has "let the case go to the jury," i. e., submitted the case to the jury for its independent voluntary consideration and verdict. Rule 50 (b) is as follows:

**"Reservation of Decision on Motion.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, *the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.* Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics ours.)

The italicized portion of the rule we have just quoted is the heart and crux of this rule. These italicized words would be meaningless if it was attempted to apply them to a situation where the trial court has granted a motion for a directed verdict in favor of one party without submitting the case to the jury. The very act of the trial court in granting a motion for a directed verdict without submitting the case to the jury is tantamount to an immediate determination of the legal questions raised by the motion for a directed verdict. The conclusion is therefore inescapable, that this pointed language in Rule 50 (b) establishes that the rule can only apply to cases where the trial court reserves its ruling on the legal questions involved in motions for a directed verdict, and submits the case to the jury for its independent voluntary

determination of the facts. The last sentence in Rule 50 (b), which reads, "If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial," also makes provision for a situation where the jury does not return a verdict, as where it disagrees. (Hughes Federal Practice, p. 336.) This last sentence also illustrates that the entire Rule 50 (b) contemplates the trial court submitting the case to the jury for its independent voluntary consideration and determination of the facts.

Since we believe we have demonstrated beyond doubt that Rule 50 (b) does not apply where the trial court takes the case from the jury and grants a motion for a directed verdict without submitting the case to the jury, the requirement under that rule for the losing party in the trial court to file a motion for judgment notwithstanding the verdict, has no application to the case at bar.

#### IV.

**The Final Order Entered By the Circuit Court of Appeals in the Instant Suit for Judgment in Behalf of the Respondents Is Not in Conflict With the Decision of This Court in the Case of Cone v. West Virginia Pulp & Paper Co.**

In the case at bar, all of the facts are undisputed and were fully developed in behalf of the petitioner; no evidence was improperly admitted in the trial court in behalf of the petitioner and questions of law only were involved. In the *Cone* case, the facts were controverted and still required a trial by jury, the plaintiff's proof as to possession was insufficient, leaving the inference that the plaintiff might introduce sufficient proof at a new trial, and evidence was improperly admitted in the trial court in behalf of the plaintiff.

It is important to note the portion of the opinion of this Court in the *Cone* case that evidence was improperly admitted in behalf of the petitioner by the trial court. No such situation exists in the case at bar. No point was made in the instant suit that the trial court improperly admitted any evidence in behalf of the petitioner. Accordingly, in the *Cone v. West Virginia Pulp & Paper Co.* case, in order to relitigate the entire case and permit the petitioner one more chance to introduce, if it can, proper and sufficient evidence to supplant the petitioner's evidence that was improperly admitted, this Court held that the case should be remanded to the trial court so that it can "exercise a discretion" to either order a new trial or direct the entry of judgment as if the requested verdict had been directed. We repeat that no such situation exists in the case at bar. There exists no improper evidence that was introduced in behalf of the petitioner which requires substitution or correction.

The opinion of this Court in the *Cone* case indicates the qualified and limited effect of this decision. The whole tenor of the decision illustrates that it only applies in cases that are still potential jury cases, or where, to prevent a miscarriage of justice, a party should be given another chance to prove his case or, in the discretion of the trial court, a party should even be permitted to take a non-suit.

None of these elements exist in the case at bar, as the petitioner's proof was fully developed, there were no disputed questions of fact, there is not present in the case a situation where the petitioner has been handicapped by the failure of missing witnesses to testify, only questions of law are involved and the petitioner does not require a new trial to supplant any improperly introduced evidence in the trial court as none was introduced in its behalf.

There exist no circumstances, nor could any exist, which would require the trial court to exercise any discretion as to the factual issues involved or the kind of evidence given or any impression made by any witnesses. No circumstances exist which require any further trial in the instant suit.

The opinion of the Circuit Court of Appeals points out correctly, we believe, that the *Cone* decision is not applicable to the case at bar. The following excerpts of the opinion of the Circuit Court of Appeals are pertinent:

"The Supreme Court did not hold that if such a motion had been made and overruled, the Circuit Court of Appeals could not have directed, if warranted in law, the District Court to sustain the motion of the defendant for a directed verdict. Nor did the Supreme Court hold that a Circuit Court of Appeals may never dispose of a case where only errors of law are involved. Rule 50(b) was adopted for the purpose of reserving automatically to the District Court the right to pass on a motion for judgment notwithstanding the verdict, even though it had denied a motion for a directed verdict and had submitted the case to the jury. *Ryan Distributing Corporation v. Caley*, 147 F. 2d 138, 142. Before this rule was adopted the case of *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, had required the court to expressly reserve that right. To avoid the *Redman* case, Rule 50(b) was adopted.

• • •

"Where the court, as in the instant case, has sustained the motion of the plaintiff for a directed verdict, the legal consequence is the same as if the District Court had submitted the case to the jury, the jury had returned a verdict for the plaintiff, and the

District Court had overruled the motion of the defendants for judgment notwithstanding the verdict.  
 • • • (Rec. 256-260)

We believe it is also evident that in the *Cone* case even if the petitioner in that case had made a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals would have been without power to reverse the judgment of the trial court and enter a judgment for the respondents, as the case was still potentially a case that required a trial by jury. This is not the situation in the case at bar where questions of law only are involved on undisputed facts fully developed by the petitioner.

We believe that the holding of the Circuit Court of Appeals in the instant suit is not in conflict with the decision of this Court in *Cone v. West Virginia Pulp & Paper Co.*

## V.

**Where the Trial Court Directs a Verdict Without Submitting the Case to the Jury, the Court Has Exercised Its Judgment on a Matter of Law and the Rendition of a Verdict by the Jury is a Mere Formality.**

Where a trial court exercised its judgment on a matter of law and grants a motion for a directed verdict without submitting the case to the jury, it is obligatory for the jury to return the verdict directed by the court. The jury is not at liberty to refuse obedience to the court's direction and the signature of the jury to a verdict is a mere matter of form. The rendition of a verdict by the jury as directed by the court is a mere formality, the decision, in effect, being one of law by the court. A directed verdict requires no jury action in order to be valid. It is obligatory on the jury to return the verdict directed by the court; they are not at liberty to refuse obedience to

the court's direction (64 C.J. Pages 503-504, Notes 31, 38, 39, 40; 26 R. C. L. 1066, Note 14).

In *Bryan v. Louisville N. R. R. Co.*, 244 Fed. 650 (Cert. denied 246 U. S. 651), an instructed verdict was held properly entered when the verdict itself was only signed by the foreman. —

In the recent Illinois Supreme Court case of *Johnson v. Bennett*, 395 Ill. 389, 69 N. E. (2d) 899, that court in commenting on the effect of a directed verdict stated:

“It was held in the case of *Kinser v. Calumet Fire Clay Co.* 165 Ill. 505, that a peremptory instruction to find for the plaintiff was, in effect, taking the case from the jury. When the court directs a verdict an issue of law is raised on the whole case, and there is no fact for the jury to find. When the court directs a jury as to the verdict to be returned, it is not necessary that a verdict be actually written out and signed by the jury and returned to the court, it being entirely within the control of the court and a question of law with which the jury has nothing to say. The question involved is whether or not the court erred as a matter of law in giving the instruction.”

At page 11 of its Petition for Certiorari, in a footnote, the petitioner poses a supposed paradox in procedure where it indulges in a bit of sophistry in wondering how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. The obvious answer to this quibbling is to propound a question to the petitioner. Suppose in the instant suit the respondents had filed a motion for judgment notwithstanding the verdict. It is obvious that the trial court would have promptly denied that motion. Wouldn't the Circuit Court of Appeals have had the unquestioned power under those circumstances to pass on matters of law and make a final disposition of the case? The mere

asking of this question carries with it the affirmative answer. Following the technical point raised by this so-called paradox to its absurd conclusion, assuming, (but not conceding) that it would be necessary for a jury to go through the needless ritual of signing a verdict because of the mandate of the Circuit Court of Appeals, all a trial court has to do is to empanel a new jury and direct that jury to return a verdict in accordance with the mandate of the Appellate Court. A complete answer to this supposed paradox is that where the trial court grants a motion for a directed verdict on questions of law or the Appellate Court by its mandate directs the trial court to enter a motion for a directed verdict on questions of law, the case becomes, in effect, a trial by the court without a jury.

## VI.

### The Facts.

**A Summary of the Undisputed Leading Facts Establishes That Questions of Law Only Were Involved in the Instant Suit. Even If the Questioned Portions of the Deposition of Todes Would Be Considered as Having Been Admitted in Evidence, the Undisputed Proof Establishes the Existence of a Disclaimer By the Respondents of Any Warranty as to the Goods, Whether Express Or Implied.**

The summary of the facts in the case at bar contained in the petitioner's Petition for Certiorari is wholly inadequate and insufficient and omits many of the decisive and leading facts in the case.

The respondents were not the shippers of goods. The goods were shipped directly from a Mexican shipper in Mexico to the petitioner, and the respondents did not handle the goods (Rec. 97). The petitioner regarded the re-

spondents as agents or brokers in the transaction (Rec. 96; 106). Mr. Lazarus, the man who ordered the goods in behalf of the petitioner, was in the liquor business all his life and he was presumably familiar with the mechanics of shipments of liquor from foreign countries to the United States. The petitioner was so anxious to have its order for the goods accepted that it paid Todes, the salesman for the respondents, a separate or "finder's" commission of \$750.00 (Rec. 96). Plaintiff's Exhibit 2, being a letter from the respondents' salesman to the petitioner, dated March 24, 1944, stated that the salesman had advised the respondents to cable the order to Mexico (Rec. 179).

The contents of the letters of credit furnished by the petitioner to pay for the merchandise established that the petitioner was in direct privity with the Mexican shipper in the transaction. The letters of credit (Plaintiff's Exhibit 4; Rec. 180-181) required the production of the following title and shipping documents before payment would be made under the letters of credit: (1) Mexican shipper's commercial invoice; (2) Consular invoice in duplicate; and (3) Original bill of lading issued to order of Mexican shipper, blank endorsed, evidencing shipment of 750 cases of Tequila to Laredo, Texas.

Accordingly, the title and shipping documents were to be sent directly by the Mexican shipper to the petitioner, which proved the direct relationship between the two.

It has been held as a matter of law that "invoices" are written itemized accounts sent to a purchaser by a seller of merchandise. (*Merchants Exchange Co. v. Weisman*, 93 N. W. 869, 870; *Southern Express Co. v. Hess*, 53 Ala. 19, 22; *State v. Standard Oil Co.*, 271 N. W. 185, 187).

The letters of credit also provided that they could be assigned and that drafts drawn against the letters of credit would be payable at The First National Bank of Chicago. The letters of credit were assigned and payment thereunder was made to The First National Bank of Chicago. Payment under the letters of credit was not made to the respondents, nor did they handle the proceeds representing the payment of the goods.

When the goods arrived in the United States and were inspected by the United States Food and Drug Administration, the examination showed that slightly more than ten per cent of the bottles of Tequila showed the presence of particles of glass (Rec. 188). *As soon as this was brought to the attention of the Mexican shipper, he promptly agreed by telegram to the petitioner to recondition the goods at his, the shipper's own expense* (Rec. 104). This offer was ignored by the petitioner.

It is common knowledge that during 1944, frequent shipments of alcoholic beverages from foreign countries into the United States contained bottles made of defective materials that caused glass particles to become loose in the beverages. The Food and Drug Administration granted conditional entry to such goods and released them when they were filtered and rebottled under United States Government supervision. In the 1944 annual report of the Food and Drug Administration, the following statement appears at page 9 of the report:

"Following discovery by California State officials in March, 1944 that storage stocks of bottled brandy from Portugal contained glass ranging from microscopic particles to long, jagged-edged slivers, nearly a half million cases of imported brandy, wine, rum, and other liquors were detained at ports of entry before the end of June. The glass apparently came from carelessly handled bottles made of defective ma-

terials. Shipments from Portugal, Spain, Uruguay, and Chile were involved. Where glass was the only contaminant, conditional entry was granted for candling, bottle by bottle, with release of those free from glass and straining of those showing glass present. Members of the industry in all affected countries are taking control measures to obviate future detentions."

Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his expense, the original transaction of sale would have been fully performed and no one would have been damaged. We believe that the opinion of the Circuit Court of Appeals in the instant case was correct in holding, in effect, that there was direct privity between the petitioner and the Mexican shipper, and it so held in the following portion of its opinion:

"Neither can it be contended that the sale was not executed by delivery of the goods conditionally to the plaintiff. The plaintiff agreed to a conditional delivery and to accept such conditional delivery by agreeing to the shipment of the goods C.I.F. Laredo, Texas, on a bill of lading made to the order of the shipper, Gonzalo A. Larrea, and endorsed by the shipper in blank, and the goods to be shipped in bond subject to the right of the United States Customs Officers to inspect and accept or refuse admission of the goods to this country. When the plaintiff, with the letter of credit which it had authorized, took up the bill of lading under such circumstances, the sale was executed, and the title to the goods passed to the plaintiff. In any view of this case the court erred in sustaining the motion of the plaintiff for a directed verdict and also erred in overruling the motion of the defendants for a directed verdict." ((Rec. 258-259.)

The amended answer of the respondents filed in the trial court set up the following agreement between the parties at the time the order was given for the goods:

"\* \* \*; that the defendants, not being in the liquor business or having an importer's license, and

not handling said merchandise in any manner, were not to be personally liable for the shipment of said liquor or its quality; that the time of shipment and quality of the merchandise would be the responsibility of the shipper in Mexico and not the defendants,  
 • • •" (Rec. 12.)

This amended answer notified the petitioner in advance of the trial of the respondents' defense that they refused to warrant the goods in any manner because they were acting as agents in the transaction.

The existence of this disclaimer of warranty was proved by the admission of Mr. Lazarus, Vice President of Globe Liquor Company, petitioner, who ordered the goods. In the single but potent fragment of the deposition of Todes that the trial court permitted to be introduced in evidence, Todes testified that he spoke to Mr. Lazarus after the goods were detained and that Mr. Lazarus told Todes:

"I agree that the shipper is responsible for it."  
 He said, "We want our money back." He said, "I am not saying that it is your fault but it is the shipper's fault." (Rec. 154.)

The trial court excluded practically the entire deposition of Todes on the motion of the petitioner. This small fragment of evidence was permitted by the trial court to stand as being introduced in evidence (Rec. 154, Lines 19-24). This was a clear admission by Lazarus that he understood and agreed that when his firm bought the goods the respondents disclaimed any responsibility as to anything concerning the goods and that this was the shipper's responsibility.

The Circuit Court of Appeals was mistaken in stating in its second opinion when it denied the petition for rehearing that the entire deposition of Todes was excluded by the trial court. However, the petitioner was almost

successful in its efforts to exclude the entire deposition. but this one small fragment, and the most important one, relating to the admission of Lazarus as to the absence of any warranty by the respondent was admitted in evidence.

At pages 17 to 21 of its Petition for Certiorari, the petitioner contends that a particular portion of Todes' deposition was introduced in evidence and that this established that the respondents were "dealers" under Section 15(2) of the Illinois Uniform Sales Act. Before the Todes deposition was read, the respondents' attorney told the trial court that he was about to read the deposition of Todes. Todes had previously been identified by Lazarus as the salesman for the respondents. Previously the trial court ruled that practically the entire deposition of Todes was excluded, except this important admission of Lazarus. As counsel for the respondents was about to read the entire deposition to the trial court, petitioner's counsel objected to the reading and asked that the jury be excluded (Rec. 144). Then the following colloquy occurred:

"By Mr. Heineman: I thought you were going to present it to his Honor.

"By Mr. Kahn: *No, on the parts which you object to, and I will read those into the record now.*

"By Mr. Heineman: All right. Starting on page: 6:

"Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (Italics ours).

The first objection to the deposition was made immediately after this last quoted question. The portion of the Todes deposition described at pages 17 and 18 of petitioner's Petition for Certiorari preceded the first question in the deposition to which objection was made by the petitioner. Inadvertently, neither counsel read to the court

the preceding portion of the deposition prior to the first objection. In other words, the only parts of the deposition that were read or considered by the court were those parts to which the petitioner made objection, and the petitioner objected to almost all of the questions propounded to the witness on direct examination. However, for the purpose of considering this Petition for *Certiorari*, it may be considered that those portions of the deposition of Todes contained at pages 17 and 18 of petitioner's Petition were introduced in evidence. This particular portion of the deposition does not prove that the respondents were dealers or principals in other transactions. The status of the respondents in these other transactions does not appear in this particular portion of the proof but in the transaction in the instant suit, it is undisputed that the respondents did not act as dealers, sellers or principals but merely as agents or brokers in the transaction, and the petitioner, through its Vice President, Lazarus, admitted several times in his testimony that he dealt with the respondents as agents or brokers.

The admission of Lazarus (Rec. 154) established, in effect, a disclaimer of any warranty of the goods by the respondents, even if it is assumed, but not conceded, that the respondents were the principals or sellers in the transaction and not the agents or brokers.

In the trial court, considerable proof offered by the respondents was excluded by the trial court. However, it is unnecessary to consider this excluded proof offered by the defendants.

It was necessary for the respondents in this brief to go into the facts with some detail in order to lay the foundation for the next point, namely, that the grounds of the respondents' motion for a directed verdict were fully stated in the trial court.

## VII.

**The Motions of the Respondents for a Directed Verdict Were Sufficient and Adequate. These Motions Included the Previous Arguments of the Respondents Throughout the Case and Both the Motions and the Previous Arguments Included the Basis of the Reversal and Entry of Judgment for the Respondents by the Circuit Court of Appeals.**

At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict. They argued it at length and the motion was denied by the trial court (Rec. 116-120).

The petitioner, at the conclusion of all of the evidence, made an oral motion for a directed verdict without giving any grounds therefor, and this motion was promptly allowed by the trial court (Rec. 173, 176). Yet, the petitioner, in a classic illustration of the pot calling the kettle black, complains that the respondents' motion for a directed verdict was not based on adequate stated grounds. This contention is erroneous.

In their amended answer, the respondents set forth their disclaimer of any warranty (Rec. 12, Lines 20 to 24). This exoneration of personal liability of the respondents as to quality is the exact equivalent of an express refusal by the respondents to warrant the quality of the goods, and negatives the existence of an implied warranty under Section 71 of the Uniform Sales Act (1945 Ill. Rev. Stats. Ch. 121½, Par. 71, Page 2960).

In their opening statement, the respondents again mentioned their refusal to warrant the goods (Rec. 55, Lines 19-26).

At the conclusion of all of the evidence in the case, the respondents presented their written motion for an instructed verdict. (Rec. 202) This written motion and the matters therein specified should be interpreted in the light of the various defenses and points that had been previously argued fully by the respondents during the course of the trial and in support of their first and oral motion for an instructed verdict which was made at the conclusion of the petitioner's case.

Even though Rule 50(a) of the Rules of Civil Procedure provides that a motion for directed verdict shall state the specific grounds therefor, technical precision need not be observed in stating the grounds for such motion. It is sufficient if the grounds are sufficiently stated to apprise the trial court clearly as to movant's position with respect to the motion (18 Hughes Federal Practice (1940), Sec. 24403).

The respondents' written motion for an instructed verdict at the conclusion of all the evidence should be construed with the previous oral argument of the respondents in support of their oral motion for an instructed verdict at the conclusion of the petitioner's case, and both the motions and the arguments and reasons in support thereof should be construed together (*Dawson v. McWilliams*, 146 F. (2d) 38; *Pickering v. Corson*, 108 F. (2d) 546.)

Although the agency phase of the case may have been stressed in paragraphs numbered 1 and 2 in respondents' written motion for an instructed verdict (Tr. 202), these specific grounds should be construed with the previous defense of the respondents set forth in their amended answer and mentioned throughout the trial of the case, that they were not liable to the petitioner in the transaction because of the respondents' disclaimer of warranty

because of their disclosed agency status in the deal. This factor by itself also negated any express or implied warranty by the respondents. This point was argued in the trial court prior to the presentation of the written motion for a directed verdict (Rec. 127).

In view of Lazarus' admission that the respondents did not warrant the goods, and the repeated references to this disclaimer of warranty by the respondents during the arguments throughout the trial, the third ground in the respondents' written motion for a directed verdict must be construed to mean that even if a warranty as to quality existed, it was not breached by the fact that a small proportion of the bottles were defective, particularly since the shipper offered to recondition the goods.

In the oral argument in the trial court by the respondents, in support of their oral motion for a directed verdict at the conclusion of the petitioner's case, the respondents mentioned the following factors: The admission of Lazarus that he regarded the respondents as brokers (Tr. 117); the admission of Lazarus that the shipment was to be made directly from Mexico (Tr. 117, 118); respondents' contention that the petitioner was in privity directly with the shipper in Mexico (Tr. 117, 118); and the admission of Lazarus that Larrea, the shipper, agreed to filter and recondition the merchandise at his own expense (Tr. 118). During this same argument the respondents mentioned their disclaimer of warranty contained in the Todes deposition on file (Rec. 127, lines 4-8).

The purpose of Rule 50(a) of the Federal Rules of Civil Procedure requiring that a motion for a directed verdict shall state the specific grounds therefor is to apprise the other party of any possible defects in his proof so that he may supply any missing parts or correct erroneous portions of the same. However, it has been

held in the cases heretofore cited in this section that the oral arguments in the case previous to the time motions for a directed verdict are made should be considered as parts of the grounds of the motions for directed verdicts. Under Rule 7(b) of the Federal Rules of Civil Procedure, a motion made during a hearing or trial need not be in writing but can be oral. Accordingly, the detailed oral arguments of the respondents in support of their motions for directed verdicts should be considered as parts of the grounds for their motions.

The refusal of the respondents to warrant the goods in any manner was repeatedly mentioned in these previous arguments, so that the existence of any warranty, express or implied, was denied by the respondents and forcibly brought to the attention of the petitioner. The petitioner's original complaint relied solely on an express warranty. Not an iota of proof was offered by the petitioner in support of this alleged express warranty and the Circuit Court of Appeals properly held that no recovery could be made when there was a total failure of any proof as to this express warranty (*Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 473; 34 N. E. (2d) 427).

Even if the petitioner had in its complaint alleged the existence of an implied warranty, the petitioner did not prove the same, as it is undisputed that the petitioner dealt with the respondents as agents or brokers and not as principals or dealers, and the respondents' refusal to warrant the goods negated the existence of any implied warranty.

## VIII.

## Disclaimer of Warranty

**The Admission of Lazarus, Vice-President of the Globe Liquor Company, Petitioner, That the Mexican Shipper Was Responsible for the Condition of the Merchandise and that the Quality of the Goods Was Not the Fault of the Respondents Established that the Goods Were Bought With the Understanding that the Respondents Disclaimed Any Warranty, Express or Implied, as to the Goods.**

Section 71 of the Illinois Uniform Sales Act (Ill. Rev. Stats. 1945, Chapter 121½, Par. 71, page 2960) provides that the parties may expressly negative the existence of an implied warranty: This statute is declaratory of the common law. (*Chicago Mills v. Berthold Stern Flour Co.* 247 Ill. App. 1)

The admission of Lazarus that the Mexican shipper was responsible for the condition of the goods and that the condition of the goods was not the fault of the respondents (Rec. 154), established that at the time the goods were ordered by the petitioner, the latter understood that the respondents expressly refused to warrant the goods under either an express or implied warranty.

In ascertaining the meaning of a contract, the construction that the parties themselves have placed upon it is of prime importance. "No extrinsic aid can be more valuable" (*Slack v. Knox*, 213 Ill. 190, 194.)

For the purpose of discussion of this point, we will assume (without conceding) that the respondents were the sellers, that is, the principals in the sale. Where the seller "gave no warranty" or refused to assume "responsibility" for the condition of goods, or "did not war-

rant the property in any manner," or where the seller used similar language, it has been repeatedly held that such language establishes a refusal of the seller to warrant the quality of the goods and a disclaimer of any warranty, express or implied as to the merchandise. Leading cases illustrating and following this principle are:

*Gilcrest Lumber Co. v. Wilson*, 121 N. 989.

*Crampton v. La Monda*, 114 Atl. 42, 43.

*Monroe v. Hickox*, 107 N. W. 719.

*Bridget L. A. W. Corp. v. Levy*, 147 Atl. 842.

*Lynch v. Curfman*, 68 N. W. 5.

*Fruit Dispatch v. Taft Co.* 197 N. W. 302.

*Cody & Edgar v. Automobile Finance Co.*, 140 S. E. 634.

*Payne v. Chall-Max Motor Co.*, 104 S. E. 453.

*Potter v. Shields*, 140 N. W. 500.

*Branch v. Peddy*, 60 S. E. 1027.

*Nemeth v. Becker Roofing Co.*, 151 S. W. (2d) 559.

*Rockwood v. Parrott & Co.*, 19 Pac. (2d) 423.

*Marks v. Kucich*, 42 Pac. (2d) 16.

*Dollen v. Miller Tractor Co.*, 241 N. W. 307.

*Case Threshing Co. v. McClamrock*, 67 S. W. 991.

*Harrell v. Holman*, 9 S. E. 1021.

*Cason v. Jordan*, 145 S. E. 537.

*Crossan v. Noll*, 120 S. W. (2d) 189.

*Blizzard Bros. v. Growers Canning Co.*, 132 N. W. 66.

*Getzoff v. Von Lengerke Buic. Co.*, 187 Atl. 539.

*Hopkinsville Motor Co. v. Massie*, 15 S. W. (2d) 423.

*Jones v. Love*, 21 S. E. 254.

## IX.

## Dealer to Dealer Sales

**When Food or Beverages Are Sold By One Dealer to Another Dealer and the Sale Does Not Contemplate the Immediate Consumption of the Food or Beverage by the Buyer But the Goods Are Bought for Resale By the Buyer, There is no Implied Warranty by the Seller as to the Merchantability or Quality of the Goods.**

The petitioner was an importer and wholesaler of wines and liquors and bought liquor for resale to other dealers. (Rec. 62). Even if we disregard the agency defense in this case for the moment and assume, without conceding, that the defendants were the principals, the sellers in the transaction, there can be no implied warranty as to quality of the goods in the instant suit, because it would then be a sale from one dealer to another whereby the latter bought for resale and not for the buyer's immediate consumption of the goods. This basic rule under the common law has not been changed in any respect by the Uniform Sales Act.

Even if Todes had not testified in the case and the proof did not include any disclaimer of warranty of any kind, it must follow from the settled authorities that in a sale of food or beverages from one dealer to another as a commercial transaction and not for the purpose of the buyer consuming the goods, there is no implied warranty as to the quality or fitness of the goods. This has been decided time and time again, and in support of this decisive point we submit the following authorities:

22 Am. Jur. 895, "Food", Sec. 109, Notes 3, 4 and 5.

*Piper v. Oppenheimer*, 158 S. W. 777.

*Wiedeman v. Keller*, 171 Ill. 93, 98, 99.

- Whipple v. Sherman*, 200 N. Y. S. 821.  
*Pelletier v. Dupont*, 128 Atl. 186, 39 A. L. R. 972.  
*Cole v. Branch*, 285 S. W. 353.  
*Tomlinson v. Armour & Co.*, 65 Atl. 883.  
*Reed & Rea v. Patterson Co.*, 54 S. W. (2d) 695.  
*Hanson v. Hartse*, 73 N. W. 163.  
*Cotton v. Reid*, 54 N. Y. S. 143.  
*Warren v. Buck*, 42 Atl. 979.  
*Nelson v. Armour Packing Co.* 90 S. W. 288.  
*Swank v. Battaglia*, 164 Pac. 705.  
*Howard v. Emerson*, 110 Mass. 320.  
*Jax Beer Co. v. Schaefer*, 173 S. W. (2d) 285.  
*Anheuser Busch, Inc. v. Butler, et al.*, 180 S. W. (2d) 996.  
 2 Mechem on Sales, Secs. 1356, 1357.  
*Tiedeman on Sales*, Sec. 191.  
*Houk v. Berg*, 105 S. W. 1176.  
*Warren v. Beck*, 71 Vt. 41.

## X.

### Latent Defects

**No Implied Warranties of Any Kind Exist in Sales By One Not a Manufacturer As to Latent Defects, Which Can Be Discovered Only By Tests.**

This reasonable rule has not been changed by the Uniform Sales Act, which does not cover this precise point.

It has been repeatedly held that where the vendor is not a manufacturer of the goods and the purchaser knows this fact, that the seller is not responsible for nor is there any implied warranty as to latent defects. Cases following this rule are:

*U. S. Fidelity & Guaranty Co. v. Western Iron Stove Co.*, 220 N. W. 192.

55 C. J. 749, note 36.

46 *Am. Jur.* p. 560, Sec. 380.

*Ehrsam v. Brown*, 91 Pac. 179, 184, 185.

*Kroger Grocery Co. v. Lewelling*, 145 Sou. 726.

*Scruggins v. Jones*, 269 S. W. 743.

*McMurray v. Vaughans*, 157 N. E. 567.

*Pennington v. Cranberry Fuel Co.* 186 S. E. 610

*Great Atlantic & Pacific Co. v. Walker* 104 S. W. (2d) 629.

*Mountain Iron & Supply Co. v. Bender*, 32 F. (2d) (242).

*Piccoli v. Paramount Lubricants Co.*, 250 Pac. 149.

*Coleman v. Simpson*, 143 N. Y. S. 588.

*Oil Well Supply Co. v. Hopper*, 282 Pac. 701.

*Crandall v. Stop & Shop Co.*, 288 Ill. App. 543.

In many of these cases just cited, the court emphasizes the equal knowledge or lack of knowledge of the parties regarding the condition of the goods. In many of the cases the court stresses that the seller did not handle the goods, but that they were shipped directly to the buyer in original containers by the manufacturer or producer.

Several of the cases just cited involve the sale of food or beverages. The defects in the goods in the suit at bar were latent defects that could not have been discovered by ordinary inspection, even if the respondents would have been dealers and had possession of the goods.

Since the respondents never saw or handled the goods, the principle, negating the existence of implied warranties of any kind as to latent defects, is applicable with all its force in the instant suit.

## XI.

**Express Warranty Excludes Implied Warranty.**

**The Alleged Existence of an Express Warranty Must Necessarily Exclude Any Implied Warranty as to the Same Subject Matter. An Action Cannot be Maintained on Both an Express and Implied Warranty as to the Same Factors.**

The entire theory of implied warranties is based on the reliance of the buyer on the seller's skill or judgment in choosing the goods. The petitioner's complaint as originally filed relied only on the existence of an alleged express warranty.

The alleged existence of an express warranty must necessarily exclude any implied warranty as to the same subject matter. An action cannot be maintained on both an express and implied warranty as to the same factors.

An express warranty follows because of the refusal of the buyer to buy, unless the seller makes an actual express warranty, that is to say, unless the seller makes written or oral representation as to quality, etc. An express warranty presumes the seller's knowledge of the condition and quality of the goods, and also assumes the buyer's reliance on the seller's skill, choice or selection of the goods. On the other hand, a claim on an implied warranty is not predicated on any reliance by the buyer as to any of those factors which exist when an express warranty is made. Consequently, an express warranty is inconsistent with an implied warranty as to the same factors.

The petitioner's complaint as originally filed is an admission or evidence against it that constitutes proof of the petitioner's deliberate refusal to rely on any implied

warranty. The petitioner's whole case when it introduced its proof and at the conclusion of all the proof in the case, relied on an express, that is to say, a special warranty. Not an iota of evidence was introduced in support of any express warranty. Therefore, under the Illinois Supreme Court case of *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 34 N. E. (2d) 427, the petitioner could not recover under an express warranty.

The inconsistencies and contradictions between express and implied warranties as to the same subject matter has been firmly established and has not been changed by the Uniform Sales Act. Section 15(6) of the Sales Act (Ch. 121½, Ill. Rev. Stat. (1945). par. 15, p. 2953) provides: "An express warranty or condition does not negative a warranty or condition implied under this Act, unless inconsistent therewith." This particular provision does not make any reference to the same "subject matter." This section of the Uniform Sales Act means that an express warranty as to one particular factor or element does not negative an implied warranty as to a different element or factor. For instance, an express warranty as to color, quantity, dimensions or weight does not exclude an implied warranty if one exists, as to quality or fitness.

The following authorities support the uniform and well settled rule that an express warranty in a contract excludes an implied warranty as to the same subject matter:

*Nave v. Gross*, 146 Ill. App. 104.

*De Witt v. Barry*, 134 U. S. 306.

*Williston on Sales* (1924), Sec. 239, P. 473.

*Nichols v. Hausberg*, 33 Pac. (2d) 198.

*Young v. Plattner*, 91 Pac. 1109.

*Reid v. Rea-Patterson Milling Co.*, 54 S. W. (2d) 695.

*Felder v. Neeves*, 136 S. E. 918.

*Hunter v. Sander*, 208 S. W. 422.

*Hampton v. Hill*, 84 S. E. 774.

*Rainey v. Simon*, 138 S. E. 41.

*Black v. Kirkland*, 155 S. E. 268.

*Buckley v. Advance*, 183 N. W. 105.

*Simmons v. Roanoke*, 107 S. E. 903.

*Gauh v. Nichols*, 107 S. W. 190.

46 Am. Jur. 516, Sec. 334.

In a number of the foregoing cases recovery was denied to buyers who pleaded the existence of an alleged express warranty but did not introduce evidence in support thereof and sought to rely on the existence of an implied warranty as to the same subject matter.

Where the buyer relies on an express warranty of quality or merchantability, he cannot recover on an implied warranty thereon. The alleged existence of an express warranty as to merchantability or quality in favor of the buyer is predicated on his lack of knowledge as to the goods and his conscious or deliberate refusal to buy the goods unless the seller expressly warrants their quality or merchantability so that the buyer actually and intentionally buys the goods in reliance on the express warranty. An implied warranty as to quality or merchantability of goods is not based on any actual deliberate or intentional express statement as to the goods by the seller, so that there is no actual or deliberate reliance by the buyer on any statements by the seller. An express warranty as to merchantability or quality of goods is therefore inconsistent with an implied warranty as to merchantability or quality of goods.

In the instant suit, since the petitioner was told that the respondents did not handle the goods and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point, there can be no implied warranty of any kind in the transaction in the suit at bar.

## XII.

### The Decision of the Circuit Court of Appeals Was Just and Fair.

**Had the Petitioner Accepted the Offer of the Mexican Shipper to Re-Condition the Goods at His Own Expense the Original Contract Would Have Been Fully Performed and No One Would Have Been Damaged.**

The petitioner dealt with the respondents and recognized them as being agents or brokers. The trial court commented on Lazarus' testimony that he, Lazarus, referred several times to the broker status of the respondents (Rec. 106). Lazarus admitted receiving a telegram from the Mexican shipper whereby the latter agreed to filter and re-bottle the merchandise at his own expense (Rec. 104). The petitioner was so anxious to procure the merchandise that it *paid* Todes a separate finder's commission (Rec. 96). Had the petitioner accepted the offer of the Mexican shipper to re-condition the goods at his own expense, the contract would have been fully performed and no one would have been damaged. During the period in question foreign importations of liquor were frequently found to be defective and thousands of cases were reconditioned under United States Government supervision and released to the public.

The terms of the letters of credit proved that the petitioner requested the production of invoices, title and ship-

ping documents directly from the Mexican shipper. It must follow, therefore, from the terms of the letters of credit, coupled with Lazarus' admission that the petitioner regarded the respondents as brokers or agents, that the respondents were not in the category "of a seller who deals in goods of that description" under Section 15 (2) of the Uniform Sales Act of Illinois. However, regardless of the characterization of the sale, whether it is considered a sale by description or sale under a trade or patent name, when Lazarus told Todes: "I agree that the shipper is responsible for it. \* \* \* I am not saying that it is your fault but it is the shipper's fault," this constituted conclusive proof that the petitioner bought the goods with the explicit understanding that the respondents refused to give any warranty as to the goods. The petitioner should live up to its bargain.

### XIII.

#### No Implied Warranty As to Quality Where Goods Are Sold Under a Patent Or Other Trade Name.

The sale was for 750 cases Tequila described as "Mariachi Gold". "Gold" referred to the yellow color of the beverage. Mariachi is a trade or patent name. Both parties tried the case in the trial court with the understanding that Illinois law would govern the transaction (Rec. 127, 128, 130, 132, 169, 171).

In *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, at page 473, 34 N. E. (2d) 427, the Illinois Supreme Court said:

"Section 15 of part 1 of the Sales Act (Ill. Rev. Stat. 1939, chap. 121½, par. 15, p. 2810), so far as pertinent, provides: (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. Since the mas-

cara was sold under its trade name, paragraph 4 of section 15 is applicable. *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631."

In *Santa Rosa-Vallego Tanning Company v. Kronauer*, 228 Ill. App. 236, the Court held that under Sec. 15 (4) of the Illinois Uniform Sales Act, where a sale of goods is made under a particular trade name, there is an implied warranty to deliver the identical article sold, *but there is no implied warranty of merchantability*. (See also *Negenfind v. Singer, et al.*, 227 Ill. App. 493)."

It therefore appears that the petitioner could not recover in this case on either an express or implied warranty as to quality, regardless whether the respondents are regarded as principals or agents, and even if the proof of disclaimer of warranty is disregarded.

#### XIV.

#### **The Trial Court's Denial of Respondents' Motion for a New Trial Constitutes Exercise of Complete Discretion By Trial Court in the Instant Suit That No Further Hearing in the Case Was Necessary.**

The respondents filed within ten days after the entry of the judgment on the directed verdict a motion in the trial court to set aside the verdict and judgment for a new trial. This motion had the same legal effect as a motion by the respondents for judgment notwithstanding the verdict would have had if filed in the trial court, assuming, but not conceding, that Federal Rule 50 (b) applied to the case at bar. The respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new

trial it exercised its discretion in that regard. This court in the decision of *Cone v. West Virginia Pulp and Paper Company* pointed out that the respondent in that case made a motion for new trial on the ground of newly discovered evidence.

In the case at bar, the respondents filed a detailed motion for a new trial (Rec. 204). This motion for a new trial requested that the trial court should set aside the verdict and judgment. That motion specified many grounds, including the oft-repeated defense that the petitioner agreed to look only to the shipper for recourse for damages and not to the respondents, and this was the equivalent of the respondents' refusal to warrant the goods.

The several grounds set forth in the motion for new trial were set up as "factual" questions, although they were undisputed. The motion for new trial was a last attempt of the respondents in the trial court to salvage some sort of relief from the trial court. Had the motion for new trial been granted, that would have constituted a signal victory for the respondents, under the circumstances. The trial court had promptly denied the respondents' motion for a directed verdict at the conclusion of the petitioner's case and also at the conclusion of all the evidence in the case, and had instead entered a judgment on a directed verdict for the petitioner. Moreover, the trial court in practically every instance had ruled against the respondents on every question that was raised during the trial.

There was a hearing on the respondents' motion for a new trial, and it was promptly denied. The trial court then had precisely the same opportunity for "a last chance to correct his own errors without delay, expense, or other hardships of an appeal," as if the respondents had gone through the meaningless ritual of having filed a

formal motion for judgment. Consequently, under this very language in the *Cone* case, there exists no need in the case at bar to remand this case to the District Court for another chance for the trial court "to correct his own errors without the delay, expense, or other hardships of an appeal".

The trial court had already fully decided the respondents' contentions and the entire lawsuit, and concluded there was no need of a retrial, and that the respondents were liable. As a matter of law the Circuit Court of Appeals held the trial court was wrong, and that the petitioner had no case against the respondents, and we believe that the Appellate Court was correct in its holding.

No matter how many times this case may be tried, the contents of the letters of credit and the other documents prove beyond all doubt that the petitioner bought the goods directly from the Mexican shipper through the respondents as agents. Moreover, the undisputed admission of Lazarus negatived the existence of any express or implied warranty of the goods. That is the sum and substance of this entire lawsuit, and there is no need of a re-trial in this case in order to prove what has already been established without contradiction or dispute. The facts in the case were fully developed as to the petitioner's case and claim. Questions of law only were involved. The petitioner did not introduce any prejudicial evidence that requires supplanting or correction.

There are no circumstances, nor can any exist in the instant suit which would require a trial court to exercise any further discretion as to the issues involved, or the kind of evidence given and particularly the impression made by witnesses. Moreover, the petitioner has not been handicapped nor precluded from offering any evidence in its own behalf. The petitioner's entire proof is all contained in the record.

After a trial court has denied two motions for a directed verdict on behalf of a party and has denied a detailed motion for a new trial by the same party and has ruled consistently against that party during the trial, it borders on fantasy to expect the trial court, when a motion for judgment is made by the losing party, to expect the trial court to immediately and completely reverse itself and set aside the original judgment and enter judgment for the moving party.

Assuming, but not conceding that Federal Rule 50 (b) applies to the case at bar, respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new trial it exercised its discretion in that regard.

## XV.

### .CONCLUSION.

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There is not present in this case a single question which justifies a review of this record by this Court, and the facts established by the undisputed evidence bar any recovery by the petitioner against the respondents. The decision of the Circuit Court of Appeals is the only just decision which could have been made on this record.

In our opinion, we believe that no special or important reason exists in this case, which should impel this court, in the exercise of a sound judicial discretion, to issue a writ of certiorari and we therefore request that this petition should be denied.

Respectfully submitted,

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